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Commercial Building Corporation v. Frank S. Blair and American Savings and Loan Association : Petition for Rehearing

Utah Supreme Court

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STATE OF UTAH SUPREME COURT
BRIEF
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DOCKET NO. 14499 PH

IN THE SUPREME COURT OF THE STATE OF UTAH

COMMERCIAL BUILDING CORPORATION,)

Plaintiff-)
Appellant,)

vs)

Case No. 14499

FRANK S. BLAIR and AMERICAN)
SAVINGS AND LOAN ASSOCIATION,)

Defendants-)
Respondents.)

PETITION FOR REHEARING

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FILED

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Respondents)

PETITION FOR REHEARING

Respondent, hereinafter called Blair, petitions
this Court for rehearing upon the following ground:

The Court erred in finding that the language in
the lease regarding additional parking area, right-of-
way and driveway area is certain and specific.

WHEREFORE, petitioner prays for rehearing and
upon such rehearing the Court vacate its decision
on file herein and for such other relief as may be
proper.

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BRIEF IN SUPPORT OF PETITION

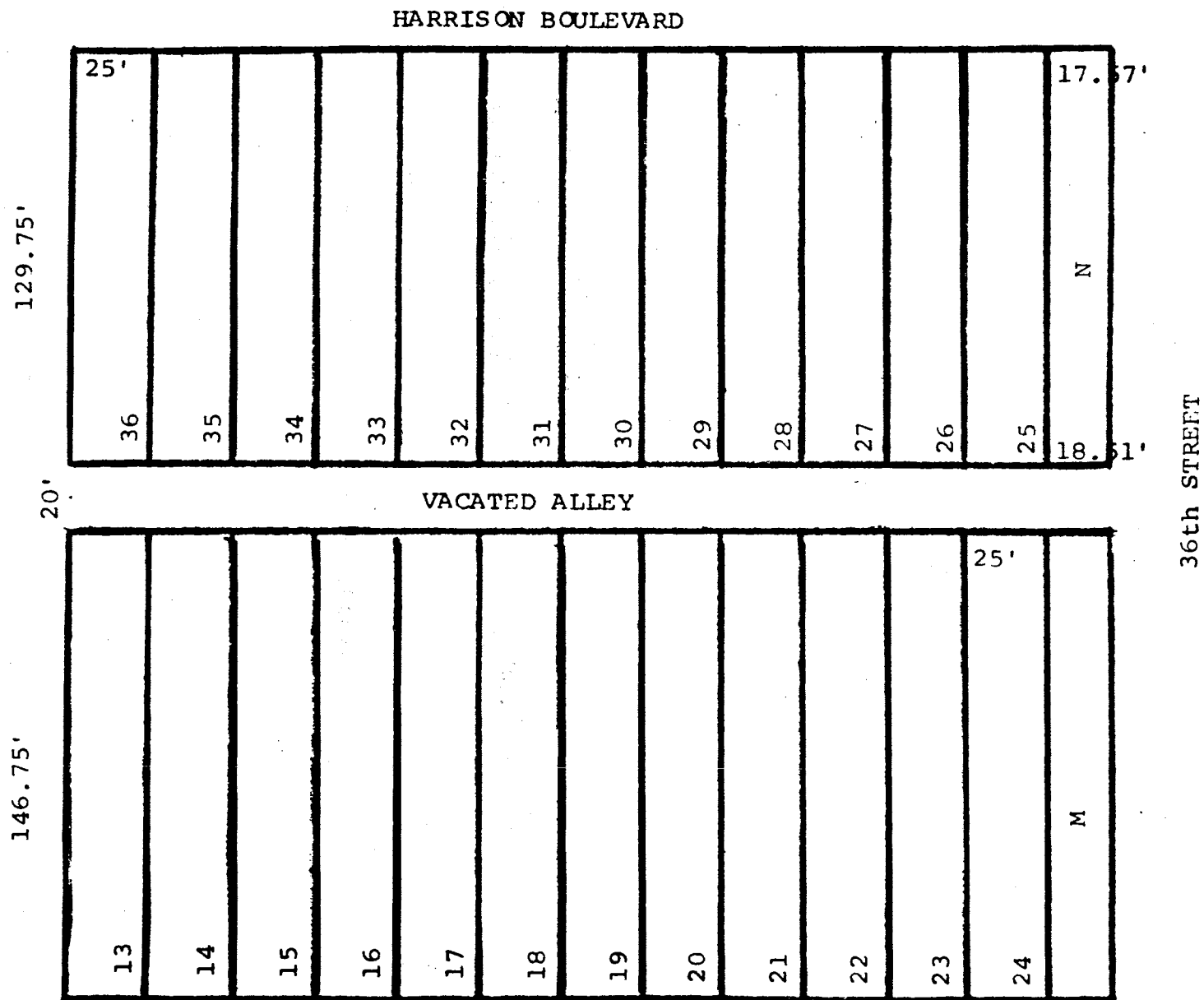
THE COURT ERRED IN FINDING THAT THE LANGUAGE
IN THE LEASE REGARDING ADDITIONAL PARKING
AREA, RIGHT OF WAY AND DRIVEWAY AREA IS
CERTAIN AND SPECIFIC.

The lease provides:

"Parcel 2: Together with joint use with other
tenants of Lessor of at least 20,000 square
feet of additional parking area, right of way
and driveway area located on Lots 25 to 30,
inclusive, of said block 26, and upon property
adjacent thereto on West."

The following is a plot plan of the property:

PART OF BLOCK 26 NELSON PARK ADDITION



The question presented is: Where is Parcel 2?

This Court found this language to be certain and specific and that the parking was to be located on Lots 25 to 30 and land adjacent on the west, and nowhere else.

The lease language refers not only to parking but also to right of way and driveway area. The 20,000 square foot area for parking was the same as the area for right of way and driveway.

The usual and ordinary meaning of "right of way" is the right of passage over another man's ground. (Kleih v Van Schoyck, 27 NW2d 490, 250 Wis 413)

The usual and ordinary meaning of "driveway" is a passage way, a travel way, a way of ingress and egress. (Frumin v May, 251 SW2d 314, 36 Tenn. App 32) or a path leading from a garage or house to a street used especially by automobiles (Dalshe v Gormley, 25 Cal Rptr, 270, 375 P2d 174).

So, the language in the lease granted parking, and the right of passage and passage way of ingress and egress or a path from the Bank to the street, and from the street to the Bank. The only way to and from 36th Street was over lots N or M or that part

of the vacated alley next to 36th Street. The language in the lease was vague and unclear as to the location of the right of way and driveway.

The Court held:

"The District Court's construction of the language used by the parties requires the substitution of the word 'or' for the word 'and'. All words used by the parties must, if possible, be given their usual and ordinary meaning and effect."

The word "and" may mean "in addition to" as this Court has held (Bountiful v Swift, Utah, 535 P2d 1236). However, the words "and" and "or" are frequently used interchangeably (State v Harwi, 230 P 331, 117 Kan 74). Also, "and" is sometimes construed in the sense of "as well as" (Williams v United States, 87 P 647, 17 Okl 28).

If we substitute the words "in addition to" for the word "and", as suggested by this Court, we have this result: The 20,000 square feet of parking, right of way and driveway is located on Lots 25 to 30 in addition to property adjacent thereto on the west.

Does this mean that 19, 462.5 square feet of parking, right of way and driveway is located on Lots 25 to 30, and 537.5 square feet of parking,

right of way and driveway is located on adjacent land to the west? If this was the intention of the parties, they had only to say so. But where is the precise location of the 537.5 square feet?

This language may mean that the 20,000 square feet of parking, right of way and driveway may be located anywhere on the larger parcel described as Lots 25 to 30 and property adjacent thereto on the west.

If we substitute the words "or" for the word "and", we have this result: The 20,000 square feet of parking, right of way and driveway is located on Lots 25 to 30 or on property adjacent thereto on the west.

This may mean that all of the parking, right of way and driveway must be located on Lots 25 to 30 (19, 462.5 square feet), or, if not there, then all of the parking, right of way and driveway must be located on land adjacent on the west.

This may mean that the 20,000 square feet of parking, right of way and driveway be located anywhere on the larger parcel of Blair's land described as Lots 25 to 30 and property adjacent thereto on the west.

If we substitute the words "as well as" instead of "and", we have this result: The 20,000 square feet of parking, right of way and driveway is located on Lots 25 to 30 as well as property adjacent thereto on the west.

This construction does not precisely locate the 20,000 square feet.

In the above examples, there would be no access to 36th Street.

Other areas where the language is vague and unclear have to do with whether the north half of the vacated alley is part of Lots 25 to 30 (20, 962.50 square feet), whether Lots 25 to 30 includes Lot N (22, 799.7 square feet). If so, there would be no need to mention additional adjacent property on the west.

How much of the 20,000 square feet should be utilized for parking and where? How much of the 20,000 square feet should be utilized for right of way and where? How much of the 20,000 square feet should be utilized for driveway, and where?

CONCLUSION

The language regarding Parcel 2 is vague and

unclear and capable of more than one meaning.

Without objection, interpretive evidence came in at the trial with regard to the Bank's intention to have access to and from 36th Street. This right of way and driveway, together with the parking comprised Parcel 2. Interpretive evidence was likewise admissable as to the location of the parking area.

The evidence at least sustains the proposition that Blair was to have flexibility in locating the 20,000 square foot area on the south part of the property, with the Bank having reasonable access to and from 36th Street.

DATED this 23rd day of June, 1977.

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